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Nos. 91-155, 91-339

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND BRIAN RUMBAUGH,
*Petitioners and Cross-Respondents,*

v.

WALTER LEE,
*Respondent and Cross-Petitioner.*

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**On Writs of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF OF PETITIONERS AND CROSS-RESPONDENTS

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Second Circuit erred in finding, in conflict with decisions of the District of Columbia, Fifth, Seventh, Eighth, and Ninth Circuits, that public spaces of airports are not "public forums."

2. Whether the distribution of literature and the solicitation of charitable contributions may be prohibited in the public areas of the New York metropolitan airports, which correspond to public thoroughfares presumptively available for free speech.

3. Whether, even if it is found that airport terminals are a nonpublic forum, the distribution of literature or the solicitation of donations may be banned absent a showing that they are inherently disruptive of airport operations.

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## BRIEF OF PETITIONERS AND CROSS-RESPONDENTS

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### OPINIONS BELOW

The opinion of the court of appeals, Appendix to Petition for Certiorari (App.) 1, is reported at 925 F.2d 576. The opinion and order of the district court, App. 29, is reported at 721 F. Supp. 572. The Magistrate's Report and Recommendation, App. 49, is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on February 8, 1991, and a petition for rehearing was denied and suggestion for rehearing en banc declined on April 25, 1991. App. 74. Petitions for writs of certiorari

were filed by petitioners (No. 90-155) on July 24, 1991, and by cross-petitioner (No. 91-339) on August 26, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND REGULATION INVOLVED

The relevant constitutional and regulatory provisions are set out at pages 1-2 of the Petition for Certiorari and pages 517-24 of the Joint Appendix.

## STATEMENT

1. Petitioners challenge a complete ban on core protected expression—the distribution of literature and the solicitation of charitable contributions—imposed by the Port Authority of New York and New Jersey in the terminals of the three principal New York airports. That such a ban is invalid had, prior to the decision below, been the conclusion of all five courts of appeals to have considered the question. Moreover, over some two decades, distribution and solicitation by political and religious groups have become an accepted feature of major airports throughout the country. Locally devised and implemented time, place and manner regulations have effectively preserved the public forum while protecting the legitimate governmental interests involved.

The Port Authority promulgated its ban, which has never been enforced, more than a dozen years after it had informally established just such a time, place and manner system. That system remains in effect, and problems under it have been predictably minor.

The challenged prohibition claims sanction on the sole ground that distribution and solicitation are inconsistent with the "purpose" of the airport. The Port defines that "purpose," however, purely by ipse dixit, given the profusion and variety of activities in the public, open areas



of the terminal that the Port Authority permits and encourages.

The rules currently in effect at the New York airports and many others maintain the existence of the marketplace of ideas in these key fora without threatening disorder. The Port Authority's flat prohibition shuts the marketplace down entirely.

2. Petitioners and cross-respondents (petitioners), the International Society for Krishna Consciousness, Inc., a not-for-profit New York religious corporation, and Brian Rumbaugh, one of its members (collectively ISKCON), follow the teachings of Krishna Consciousness, a religion within "the broad theological umbrella of the Vaishnava tradition of Bhakti Hinduism, formalized in the ninth century in Southern India." *International Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 433 (2d Cir. 1981). Krishna Consciousness was introduced in America in 1965 by A.C. Bhaktivedanta Swami Prabhupada.

In accord with the central importance of scripture to the religion, Srila Prabhupada translated and wrote over 100 books, including the *Bhagavad-gita*, the 25-volume *Srimad-Bhagavatam*, and 17 volumes of *Sri Caitanya-caritamrta*. He also instructed his followers to disseminate the written teachings as widely as possible. ISKCON members, like colporteurs of other faiths, are required to venture into public places in order to proselytize, distribute religious literature, seek support, including donations, and provide information about their religion. Called *sankirtan* in Sanskrit, this activity lies at the core of Krishna Consciousness and is its very lifeblood. *See Barber*, 650 F.2d at 443.

When this lawsuit was filed, Walter Lee was the Superintendent of Police of the Port Authority of New York and New Jersey. The Port Authority was created in 1921 by interstate compact, N.Y. Unconsol. Law §§ 6401-6423 (McKinney 1979 & Supp. 1991); N.J. Stat.

Ann. §§ 32:1-1 to -24 (West 1990 & Supp. 1991). As one of its functions, the Port Authority operates John F. Kennedy, LaGuardia and Newark Airports under leases with the States of New York and New Jersey, which own the airports.

In 1947, the Port Authority assumed jurisdiction over the air terminals, *see* N.Y. Unconsol. Law § 6631 (McKinney 1979); N.J. Stat. Ann. § 32:1-35:1 (West 1990), as a fundamental public function:

> The effectuation, establishment, acquisition, construction, rehabilitation, improvement, maintenance and operation of air terminals by the Port Authority is and will be in all respects for the benefit of the people of the States of New York and New Jersey for the increase of their commerce and prosperity, and for the improvement of their health and living conditions; and the Port Authority shall be regarded as performing an essential governmental function in undertaking the effectuation, establishment, acquisition, construction, rehabilitation, improvement, maintenance or operation thereof, and in carrying out the provisions of law relating thereto.

N.Y. Unconsol. Law § 6634 (McKinney 1979); N.J. Stat. Ann. § 32:1-35:4 (West 1990).

3. JFK, Newark, and LaGuardia airports are vital to life in the New York metropolis. Linked to the metropolitan area by a network of eight major highways, *e.g.*, Joint Appendix (JA) 382, they constitute the busiest airport complex in the world, JA 355. In 1986, the three airports served 78,846,000 passengers—7.8 percent of the entire domestic market, and 54.4 percent of the trans-Atlantic market, JA 297—indeed, JFK is the Nation's leading international gateway. By the end of this century, this number is expected to increase to more than 110 million passengers a year, JA 355, a figure that does not include "meeters and greeters" and other visitors to the terminals. In 1986, the three airports employed 64,100 people, at an estimated annual payroll of $2.1 billion. JA 297.



Neither the Port Authority nor the airlines limit or monitor public access to the three airports or to the public areas of the terminals. People freely wander about and use the facilities within the terminals for shopping, eating and drinking, banking, looking at art, and sightseeing, as well as air travel.

Petitioners do not seek to distribute literature or solicit contributions in private offices, ticket counters, check-in areas, baggage claim areas, arrival and departure gates, or gate waiting areas. Rather, ISKCON members seek to distribute religious literature and solicit voluntary donations only in general circulation areas. JA 114-15.

Like the cities they serve, all three airports offer a complex environment. The airports encompass restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, bookstores, newsstands, seating areas, advertising displays, public information stations, dental offices, private clubs—even a branch of Bloomingdale's. *See* JA 183-85 (Newark), JA 185-86 (JFK), JA 190-92 (LaGuardia).

Before this lawsuit was filed, the Port Authority, by agreement, permitted petitioners and others "to distribute literature and solicit contributions within appropriate public areas of [the] air terminals," JA 63, which it owns and operates. These areas include: (1) the second-floor central lobby at LaGuardia; (2) the main lobby of the North Terminal at Newark; (3) the mezzanine level of Terminal B at Newark; and (4) the second floor central lobby and mezzanine area of the IAB. JA 113. In June, 1985, Morris Sloane, then Deputy Director of Aviation, testified that the arrangement between petitioners and the Port Authority "has gone fairly well." Deposition of Morris Sloane at 75 (June 10, 1985). The agreement continues in force.

4. This action was filed on October 25, 1975. On the same day, ISKCON sought a temporary restraining order

and a preliminary injunction against enforcement of Port Authority regulations, N.Y. Admin. Code tit. 21, §§ 1260.13-.15, that required a license as a condition of the exercise of speech at the three airports. The Port Authority and Mr. Lee moved to dismiss. *International Soc'y for Krishna Consciousness v. New York Port Auth.*, 425 F.Supp. 681 (S.D.N.Y. 1977). Judge Carter denied the motion to dismiss with respect to Mr. Lee, but dismissed the Port Authority. The court, although noting that the regulations were unconstitutional on their face as granting unbridled discretion to deny licenses, *id.* at 687, denied a preliminary injunction, on the ground that the airlines that leased space from the Port Authority were indispensable parties, *id.* at 686.

Twenty-eight airline defendants moved to dismiss the complaint on November 8, 1979, asserting that the prohibition of expression in the leased areas of the airports was not "state action." The Port Authority denied that its regulations applied to the leased areas, or that the regulations applied to non-commercial activities. *See, e.g.*, Defendant Walter Lee's Memorandum In Opposition To Plaintiffs' Motion For A Preliminary Injunction at 2 (Nov. 7, 1979). Plaintiffs again moved for a preliminary injunction against both the Port Authority and the airlines.

The district court denied both motions. On the motion to dismiss, the court held that the "symbiotic relationship" between the airlines and the Port Authority established state action. Memorandum Opinion and Order at 46-55 (July 23, 1982). The court denied the preliminary injunction motion as moot because the Port Authority represented that the regulations in effect in 1982 did not apply to non-commercial activity. *Id.* at 58.

On April 20, 1983, the district court certified, pursuant to 28 U.S.C. § 1292(b), an interlocutory appeal by the airlines of the denial of their motion to dismiss. The court of appeals granted leave to appeal, but remanded the case for further development of the record. *International Soc'y for Krishna Consciousness v. Air Can.*, 727 F.2d 253, 255 (2d Cir. 1984).



After discovery, which involved an excursus into the Hague Convention, *see International Soc'y for Krishna Consciousness v. Lee*, 105 F.R.D. 438 (S.D.N.Y. 1984), the airlines again moved to dismiss. On June 1, 1987, Magistrate Dolinger recommended that the motions be denied.

On November 11, 1987, petitioners moved for summary judgment, or, in the alternative, for a preliminary injunction, on the state action and public forum issues. Before any ruling on the motion, the airlines were dismissed from the case under a settlement agreement, mooting the state action question. *See* JA 534.

After the airlines were dismissed, the Port Authority, for the first time, more than twelve years after the action was filed, asserted a right to prohibit ISKCON's activities in the terminal areas under the Port Authority's exclusive control. On February 11, 1988, the Port Authority promulgated a resolution codifying this policy. Under the resolution, the "continuous or repetitive" sale or distribution of literature and solicitation of donations is prohibited. JA 523-24.[1]

The only justification for the restriction expressed in the resolution is that the expressive activities by nonprofit organizations are inconsistent with the "intended purpose of the airports—air travel." JA 517. Between 1985, when Mr. Sloane testified that the arrangement allowing petitioners to distribute literature and solicit funds in the terminals "has gone fairly well," and 1988, when the new resolution was promulgated, Port Authority staff alleged only two rules violations, both for "verbal abuse." *See* Sloane Affidavit, Exhibit C.

Based upon the Port's representation at argument that during the litigation petitioners would be permitted to

[1] There are indications in the preamble that the resolution was specifically directed at ISKCON. *See* JA 517.

continue the distribution of religious literature and solicitation of donations in the interior terminal areas, JA 494, petitioners conditionally withdrew their request for preliminary injunction, JA 505-506.

On October 25, 1988, Magistrate Dolinger recommended that petitioners' motion for summary judgment be granted. The magistrate found that "the general circulation areas of the passenger terminals . . . are public fora, and that a total prohibition against leafletting and solicitation within these buildings is inconsistent with the requirements of the first amendment." App. 72. He found that the

> interior terminal areas bear a strong physical resemblance to the quintessential public fora of streets and parks. Like streets, they have broad corridors "lined by shops, restaurants, and other businesses, with travelers or other members of the general public coming and going as they please." . . . Like parks, they have large open areas where people meet each other or relax in public seats. They are open at all times of day, and there is absolutely no restriction on entry. In short, these areas both look and function like public thoroughfares.

App. 70-71 (quoting *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988)).

The Port Authority objected to the Magistrate's Report, JA 545, but the district court issued an Order and Opinion on September 15, 1989, adopting the magistrate's recommendation and granting summary judgment for petitioners. Applying *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), the court found the general circulation areas of the airport terminals "possess the characteristics of a bustling metropolitan boulevard," App. 40, 721 F.Supp. at 576, and are "the functional equivalent of public streets," App. 41, 721 F.Supp. at 577. The court agreed that "the airports' character, pattern of activity and nature of



purpose make the terminals appropriate places for the exercise of First Amendment activity and place them squarely within the public forum family." App. 47, 721 F.Supp. at 579.

5. A divided panel of the court of appeals affirmed in part and reversed in part. Acknowledging that it had initially intended to affirm the judgment in its entirety, it concluded that the intervening opinion in *United States v. Kokinda*, 110 S.Ct. 3115 (1990), had "altered public forum analysis." App. 10, 925 F.2d at 580.

Until *Kokinda*, the majority believed, streets, and sidewalks were treated as traditional public fora without "a detailed analysis of their particular purposes." App. 11, 925, F.2d at 580. It asserted, however, that *Kokinda* made a forum's "purpose" dispositive. App. 13-14, 925 F.2d at 582. The majority read *Kokinda* as holding that when the "particular purpose of a place" is such that "the public uses [it] as a matter of necessity, or at least great convenience," the "in-person solicitation of funds" may be banned. *Id.* The court, however, counted at least five *Kokinda* votes as permitting the in-person distribution of literature in the same place. *Id.* Accordingly, it reversed "insofar as the district court invalidated the Port Authority's ban on the in-person solicitation of funds but affirm[ed] insofar as it invalidated the Port Authority's ban on the distribution of literature." App. 3, 925 F.2d at 577.

Chief Judge Oakes dissented because he "believ[ed] that *Kokinda* [wa]s neither controlling nor a substantial deviation from the Court's public forum analysis." App. 17, 925 F.2d at 583. While recognizing that "the purposes of a forum are highly relevant to the traditional public forum inquiry," App. 18, 925 F.2d at 583, he asserted "that a forum's purpose alone can[not] dictate its status," *id.* If this were the case, then "[v]irtually all Government owned property" that "has an ostensible 'purpose' other than the promotion of free speech, as-

sembly, and debate," *id.*, would be unavailable for the exercise of First Amendment rights. Public forum analysis, the dissent maintained, turns not solely upon a forum's purpose, but rather upon a myriad of factors, all discussed in *Kokinda*, including the forum's location, the degree of access which the public has to the forum, and whether the forum in question has traditionally been used for expressive purposes. App. 20, 925 F.2d at 584. Applying these factors, Judge Oakes would have found the airport terminals to be "traditional public fora." App. 26, 925 F.2d at 586.

Three judges dissented from the denial of rehearing en banc. *See* App. 75, 925 F.2d at 587 (opinion of Oakes, C.J., joined by Newman & Cardamone, JJ.).

This Court granted ISKCON's petition for certiorari (No. 91-155) and the Port Authority's cross-petition (No. 91-339) on January 10, 1992.

## SUMMARY OF ARGUMENT

Modern public airport terminals mirror the cities they serve, with spacious pedestrian walkways lined by a surprisingly varied array of shops and services aimed at attracting traveler and non-traveler alike. More than that, they are, like city streets, the paths along which journeys begin and end, connecting communities to the nation's airways, much as Main Street leads to the interstate highway. For many years, the nation's sprawling and diverse airport terminals, like municipal streets and sidewalks, have been available for expression, including the distribution of literature and the solicitation of donations by political and religious organizations.

There is considerable evidence that, for as long as there have been cities, their gates have been focal points for communication. Certainly, in this country, transportation centers—the gates to the modern city—have long been places for free expression. In the eighteenth century, the wharves were focal points for the exchange of information and ideas. The seaborne immigrants of the nineteenth century were met at Ellis Island by colporteurs of many faiths, harbingers of the pluralism of religious belief, the possibility of change and of the promise of freedom that this country held. Now, the International Arrivals Building at Kennedy Airport has supplanted the Great Hall at Ellis as the point of entry. The Court has before it representatives of the many groups that have carried on the tradition of expression in these places.



As railroads grew, their terminals became vast urban meeting halls, natural centers for religious and political expression. With the arrival of the jet age, and the explosion in air travel in the past thirty years, the airport terminals have succeeded other transportation centers of the past as places where a wide spectrum of views may be expressed to the American public and to travelers from around the world.

No court has ever approved a regulation of speech as restrictive as that advocated by the Port Authority, which would absolutely prohibit organized expression within the three New York metropolitan airports. Indeed, until the decision below, the courts had recognized that transportation facilities in general and airport terminals in particular were public fora.

Operating from that premise, the nation's airports have for many years balanced the right to free expression with the need to facilitate the airports' functions, enacting what are "in effect a set of Robert's Rules of Order," Harry Kalven, Jr., *The Concept of the Public Forum*: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 12—time, place and manner regulations that have proved effective in preventing abuse of the right to speak. In the two decades since courts first approved the distribution of literature and solicitation of donations in airports, the airport authorities have settled on an easily adaptable set of such regulations. Time has shown that limiting speakers by place and number avoids any potential for the atmosphere

of a bazaar and avoids any measurable interference with the orderly functioning of the terminal. Indeed, the Port Authority itself has had great success with such rules since before this case was filed seventeen years ago. The regulation at issue here is premised not on a specific need or interest, but upon the abstract conclusion that expression is not necessary, as the Port sees it, to fulfilling the airport's transportation function.

The panel majority below recognized the extent to which airport terminals resemble the streets and sidewalks of the cities they serve, and acknowledged as well the unbroken line of appellate authority finding that airports are public fora. Nevertheless, in an opinion marked more by vote-counting than analysis, it concluded that *United States v. Kokinda*, 110 S. Ct. 3115 (1990), compelled it to find that airports are not public fora, and that while literature distribution could not be prohibited, solicitation of contributions, speech just as much at the core of the First Amendment, could be prohibited. In reaching its result, the majority below engaged in an essentially legislative judgment, relying on distinctions the Port Authority never made.

The limitations inherent in the narrow, single-purpose sidewalk leading from a parking lot to the suburban post office in *Kokinda* are entirely absent from public airport terminals. The choice posited by the Second Circuit—between forum and function—is a false dichotomy, for history and experience demonstrate that airline terminals are important and appropriate fora for expression.



## ARGUMENT

### I. THE PORT AUTHORITY'S RULE SPECIFICALLY BANS FORMS OF FULLY PROTECTED SPEECH.

The Port Authority regulation is a complete prohibition of core forms of protected speech in all publicly owned and operated terminals of the three New York airports. It bans, among other things, "continuous and repetitive" (1) "sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material," and (2) "solicitation and receipt of funds."

The distribution of books, pamphlets, and other printed matter—"historic weapons in the defense of liberty"—is itself an "essential liberty" that it is "vital[ly] importan[t]" to 'protect[] . . . from every sort of infringement." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). It may not be "absolutely prohibit[ed] . . . in the streets and . . . other public places." *See Schneider v. State*, 308 U.S. 147, 162 (1939). When adherents of Krishna Consciousness distribute their scriptures in public places like the public air terminals of New York they engage in "an ago-old form of missionary evangelism—as old as the history of printing presses," that "has been a potent force in various religious movements down through the years." *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (footnotes omitted).

"[T]he mere fact that religious literature is 'sold' . . . rather than 'donated,'" *Murdock*, 319 U.S. at 111, does not lessen the protection. The Court has recognized the reality that books and pamphlets are costly to produce, and that the costs cannot be expected to be absorbed indefinitely by a political or religious group. *See id.; Follett v. Town of McCormick*, 321 U.S. 573, 576 (1944).

Solicitation for charitable and religious causes is also fully protected speech. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 789 (1988); *accord, id.* at 803 (Scalia, J., concuring). Solicitation "involve[s] a

variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). "Face-to-face encounter[s]" for solicitation provide a significant "opportunity for the exchange of ideas and the propagation of views," *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 798 (1985), for which there is no adequate or ready substitute.

Moreover, "without solicitation the flow of such information and advocacy would likely cease," *Schaumburg*, 444 U.S. at 632, and it might prove impossible, especially for newly-organized or underfunded groups, to print and distribute religious or political texts. "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern." *Murdock*, 319 U.S. at 111. Solicitation also requests an act that is itself expressive, a contribution to the cause. *See Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

## II. THE AIRPORT TERMINALS ARE PUBLIC PLACES FROM WHICH THE DISTRIBUTION OF LITERATURE AND SOLICITATIONS MAY NOT BE BANNED.

### A. Quintessential Public Fora Are Not Limited to Streets and Parks.

In this century's classical formulation, public fora are those "streets and public places" that must be deemed to be "held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J., joined by Black, J.). The essence of the doctrine is that, "although parks and streets", for example "serve the diverse purpose of traffic and recreation," the municipality in whose name they are owned cannot but allow at least some public expression. Zechariah Chafee, Jr., *Free Speech in the United States* 418 (1941), including the



activities involved here, the distribution of literature and the solicitation of contributions, *see, e.g., Schneider v. State*, 308 U.S. 147, 160-61 (1939).

The public forum doctrine plays a key role in encouraging "the widest possible dissemination of information from diverse and antagonistic sources" that is "essential to the welfare of the public." *See Associated Press v. United States*, 326 U.S. 1, 20 (1943). "[T]he poorly financed causes of little people," *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943), in particular, require access to the forms of speech useful in public places. It is in the public forum that movements too impecunious or too unpopular to buy or be granted access to media like direct mail, newspapers, radio, and television can put their version of the truth out on offer, and provide competition to those with greater access to the more costly means of communication. *See* Lyn H. Lofland, *The Urban Milieu: Locales, Public Sociability, and Moral Concern, in Social Organization and Social Process* 189, 195-96 (David R. Maines ed., 1991).

These places of public movement and gathering are the most literal embodiments of the marketplace of ideas, where information of all kinds can be quickly and inexpensively exchanged, challenged, discussed. Rejected the messages may often be, but they may also prove influential, if only to one individual at a time. It is here where the latter-day cries of "Take up and read" are to be heard—cries that may make a chance listener's "countenance alter[]" and lead him "to think most intently." *Cf. The Confessions of Saint Augustine* 159 (Edward Bouverie Pusey trans., Franklin Library ed. 1982). This is the goal of speakers like the petitioners here, and, if it is achieved, the highest function of the Free Speech Clause would have been fulfilled.

The physical forms that fora assume may, of course, vary. A street would not lose its character as a forum because it is covered. Places like state-owned shopping

malls are undoubtedly public fora. *See generally Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).[2]

Public fora provide marketplaces of ideas, not bazaars. Reasonable time, place and manner regulations, even-handed in formulation and application, are fully available to ensure order.

The Court has not had occasion to define the scope of the "public places" that constitute qûintessential fora. The post-war years have, as has been much remarked, witnessed the decline of American downtowns, the usual locus of streets and parks, with the concomitant contraction of public space. *See, e.g.*, Forum, *Whatever Became of the Public Square?*, Harper's Mag., July 1990, at 49. "[T]he principal functions of the street" are increasingly "put[] . . . almost anywhere but on street level." William H. Whyte, *City: Rediscovering the Center* 193 (1989). Parks, too, have suffered diminished public support. *See, e.g.*, Galen Cranz, *The Politics of Park Design: A History of Urban Parks in America* 175 (1982).

Against this background, other traditional public fora have gained in both importance and visibility. Prominent among these have been major transportation centers, the most important of which today are metropolitan airports. As discussed below, the airport terminals not only serve

[2] The historical places from which the modern metaphor of "forum" derives were often enclosed places. Both the Roman forum and its antecedent the Greek agora were characterized by two-storied colonnaded buildings. Wolfgang Lotz, *Studies in Italian Renaissance Architecture* 75 (1977). The Roman basilicas traditionally adjacent to the forum itself were large, usually roofed, public structures containing markets, courthouses, covered promenades, and meeting halls. *See* William Anderson & R. Phené Spiers, *The Architecture of Greece and Rome* 192-93, 226-30 (1907). In the agora, the roofed porches of the stoas housed small shops and stores and provided the citizens with an excellent place to meet and exchange views. *See id.* at 136-39; William Dinsmoor, *The Architecture of Ancient Greece* 240-41, 262-64 (W.W. Norton 1975) (3d ed. 1950).



as transportation interfaces, but have become essential thoroughfares complementary to downtown streets.

### B. The Public Spaces of Airports Are Fora by Recent Convention and by Tradition.

The primary category of public fora consists of places "clearly held in trust, either by tradition or recent convention, for the use of the public at large." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984). Major airports like those at issue here fit well within both descriptions.

"Traditional"[3] fora are generally "public thoroughfare[s]," including "open spaces, . . . meeting hall[s], park[s], [or] street corner[s]." *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (plurality opinion); *see also United States v. Kokinda*, 110 S.Ct. 3115, 3120 (1990) (plurality opinion); *Greer v. Spock*, 424 U.S. 828, 835 (1976).

The terminals of the three New York areas are unquestionably public thoroughfares. They "possess," as the district court recognized, "the characteristics of a bustling metropolitan boulevard." App. 40, 721 F. Supp. at 576. " 'Publicly owned, conceived for public use, continuously open, stocked with a congeries of commercial sellers, dispensers of information, and diversions and conveniences of all sorts, they constitute one of the great crossroads in the vast metropolitan New York region and the nation's foremost hub of international travel, commerce, and exchange of information.' " *Id.* Airports circulate people and ideas from around the country and the world. Few, if any, places in the fragmented culture

[3] "Tradition" hardly entails immutability. "We should realize from the beginning that a completely stable or rigid tradition that never admits change is humanly impossible and has never existed." Paul Oskar Kristeller, *"Creativity" and "Tradition,"* 44 J. Hist. Ideas 105, 112 (1963).

of contemporary American society compare with airports as a point of access to such a breadth of cultures and information.

The courts have always understood that major transportation terminals, including airports, are public thoroughfares from which classic expressive activities like those proposed by petitioners here may not be prohibited. Indeed, the notion that airports, as much as streets, are places where the public expects to encounter these activities is embedded in current popular culture.

The seminal case on the subject struck down the policy of the Port Authority to deny access to its bus terminal to those seeking to use it as a forum for expression. *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 88 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). As a "thoroughfare used by thousands of people each day," and with a "main concourse resembl[ing] a street," *id* at 89, "[t]he Terminal building is an appropriate place for expressing one's views . . .," *id.* at 90.

The year before *Wolin*, the California Supreme Court had held that expressive activities could not be barred from railroad stations. *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Ctl. Rptr. 97 (1967). *Wolin* and *Hoffman* thus clarified the "[p]ublic forum status" of "municipal bus terminals and railroad stations." *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 313 n.4 (1974) (Brennan, J., joined by Stewart, Marshall & Powell, JJ., dissenting).

From those holdings it was a short and clearly marked step to the conclusion that public airport terminals must also be available for expressive activity. There quickly developed an "unusual consensus of judicial, legislative, and administrative opinion [that] would classify the public areas of [airports] . . . squarely within the public forum family." *U.S. S.W. Afr./Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 766 (D.C. Cir. 1983).[4]



The judicial arena displays an almost unbroken line of cases, from the earliest, *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973), to the most recent, *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 774 F. Supp. 977 (D.S.C. 1991). The Eighth Circuit reported in 1987 that "every court that has decided the issue has held that an airport is a public forum," *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283, (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988), and the Fifth Circuit, six years before that, noted that the result "is now generally well established," *Fernandes v. Limmer*, 663 F.2d 619, 626 (5th Cir. Unit A Dec. 1981), *cert. dismissed*, 458 U.S. 1124 (1982). Most of the litigation occurred between 1974 and 1978. The result was that the literature distribution and funds solicitation has become accepted practice in airports across the country.[5] The presence of distributors and solicitors is a familiar and expected feature of airports' bustling and cosmopolitan ambiance.[6]

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[4] This consensus has reached across international borders. In *Committee for Can. v. The Queen*, 1 S.C.R. 139 (Can. 1991), the Supreme Court of Canada affirmed that a ban on expression at Dorval Airport in Montreal violated the Canadian Charter of Rights and Freedoms. "But, train and airport terminals are indeed modern boulevards, extension of Main Street. The list of sites traditionally associated with speech is not static. As means of locomotion progress, people shall begin to gather in areas heretofore unknown." *Id.* at 206 (opinion of L'Heureux-Dubé, J.).

[5] See Table A for a more complete list of cases in which the public forum status of airports has been raised.

[6] When Boris Yeltsin—then in the Soviet opposition—arrived at JFK in 1989 for a United States visit, he received what the Associated Press tellingly described as "a taste of Western life—a greeting from a Hare Krishna follower who gave him two books and two roses." Poughkeepsie J., Sept. 10, 1989, at 3A.

The recognition has proceeded from the courts' understanding of the essential similarity of metropolitan airport terminals and accepted public fora, like streets. *See, e.g., Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *Fernandes*, 663 F.2d at 627; *U.S. Southwest Africa*, 708 F.2d at 764; *Jamison*, 828 F.2d at 1283.

In 1980, Congress required the FAA—the agency that oversees airports and directly controls National and Dulles airports—to promulgate regulations regarding "access to public areas [in National and Dulles] by individuals or by religious and nonprofit organizations . . . for the purpose of soliciting funds and distributing materials." 49 U.S.C. app. § 1359(a) (1988). In the course of debate, Senator Morgan observed:

> The reality is that other airports have seen fit to create moderate, specific regulations to allow proper exercise of First Amendment rights, while protecting the ability of passengers to move freely and unhindered through public facilities.

125 Cong. Rec. S9174 (daily ed. May 1, 1979).

In carrying out the mandate, the FAA observed that "large portions of the airport buildings at National and Dulles were designed for and are open to the general public," and that "[t]here is a considerable amount of social and commercial interchange in the terminals." The agency concluded that, "in many respects, the terminals are like any other public thoroughfare where there is no question" that distribution of literature and solicitation of contributions is appropriate. 45 Fed. Reg. 35,314 (1980). The resulting regulations, 14 C.F.R. §§ 159.91, 159.93, 159.94 (1991), allow these activities, subject to a set of time, place and manner rules analogous to those adopted by many other airports across the country, *see infra* pp. 39-41.



### C. Airport Terminals Are Descendents of Transportation Centers Historically Regarded as Fora.

#### 1. *Transportation centers have historically been meeting places and places for the exchange of ideas.*

The human landscape has, throughout history, been defined by transportation routes. *See* 1 Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II*, at 276-77 (Siân Reynolds trans., 1972). At the "halts" in these routes arose towns, *id.* at 277, and within the towns, the "nodal points" from which the modes of transport emanate. "The city, Lewis Mumford once observed, sits like a spider in the midst of its transportation web." Willfred Owen, *Transportation and World Development* 54 (1987). As new transportation routes were created and new means of transportation devised, new entryways to cities—and new kinds of public places—came into being. *See* K.H. Schaeffer & Elliott Sclar, *Access for All: Transportation and Urban Growth* 14 (1975) ("distinct new urban settlements" were created at areas outside city gates, as the need for protection diminished).

Transportation junctions have naturally evolved as centers of communication for both physical and psychological reasons. Not only do they concentrate people arriving from and departing to other points, but "[b]ecause decisions must be made at junctions, people heighten their attention at such places and perceive nearby elements with more than normal clarity." Kevin Lynch, *The Image of the City* 72-73 (1960).

In the American context, wharves and railroads served into this century as transportation hubs. *See* Steve Izenour, *La Ville Américaine et ses Portes, in Les Portes de la Ville* (Chantal Noël ed., 1983). Both predictably developed into places where not only goods, but ideas, were exchanged.

In the early years of our national development "the only practical means of transport was by water; therefore, the development of the country was coastal. The principal cities of the day were Boston, Providence, New York, Philadelphia, and Baltimore—all possessing excellent deep-water ports." Charles Froesch & Walther Prokosch, *Airport Planning* 2 (1946). The ports were "information 'hothouses,'" whose "high density and overlapping quality of information networks carried information efficiently and helped integrate the diverse elements of the community." Richard D. Brown, *Knowledge is Power: The Diffusion of Information in Early America, 1700-1865*, at 129, 131 (1989).

In the eighteenth century, with printing still a relatively slow process, face-to-face communication was the paramount means by which to keep abreast of news, commercial data, and social currents. *Id.* at 114.[7] The wharves were a principal focus of these interchanges. *See id.* at 112. In the words of Thomas Nelson, a Philadelphia merchant, one would simply to "'walk[] down Town by the Wharves'" to obtain and exchange information. *Id.* at 114.

The phenomenon continued well into the nineteenth century. At the port of San Francisco, for instance "[t]he waterfront was the scene of all sorts of public events . . . . Market Street Wharf and the other wharves to the north of it were not only landing places, but also served as business streets." John H. Kemble, *San Francisco Bay: A Pictorial Maritime History* 16 (1957).

Missionaries early discovered that particularly important work was to be done at transportation centers. The American Tract Society's colporteurs—evangelists selling

[7] Printing was, of course, significant. For example, in 1776, Thomas Paine spent considerable time at Perth Amboy, New Jersey, personally selling copies of *Common Sense*, and leaving with the not inconsiderable sum of $48. David Freeman Hawke, *Paine* 57-58 (1974).



bibles and religious pamphlets—made thousands of visits to steamboats and railroads, and it was their aim to "reach[] all the prominent thoroughfares of the country, so that every traveler for business or pleasure should be made to feel that his spiritual needs are cared for, and that the claims of God meet him at every turn in the road of his pilgrimage." American Tract Society, *Twenty-Fifth Annual Report* 67 (New York, American Tract Society 1850).[8] Travelers, it was found, were receptive to the Society's messages. "'Travelers when away from home, and among strangers, often cast off the fear of God and devote their leisure hours to reading bad books, and need to be reminded that the eye of the omniscient God is upon them, and that they are hastening to that bourne from which no traveler returns.'" American Tract Society, *Twenty-Sixth Annual Report* 57 (New York, American Tract Soc'y 1851).

The American Tract Society, founded in 1825 by merger of a number of small tract publishers of various Protestant denominations, adopted in 1841 the Reformation-era practice of colportage. The Society's agents were given the job of selling books and, at the same time, striking up conversations about religion, with a view to converting their customers. These practices, similar to ISKCON's practice of *sankirtan*, also took them into as many public places as possible. James T. Siburt, *Tennessee Colporteurs: Flatboat Evangelism*, 47 Tenn. Hist. Q. 227, 228 (1988).

[8] The colporteurs seemed ubiquitous at transportation sites. They "ministered among sailors in the major harbors, on the canals, and aboard rafts and river boats in the Mississippi." Stephen Elmer Slocum, Jr., The American Tract Society: 1825-1975, An Evangelical Effort to Influence the Religious and Moral Life of the United States 91 (1975) (unpublished Ph.D. dissertation, New York University). They even appeared at wagon-train trailheads. On May 12, 1846, an American Tract Society agent handed out scriptures to every person in the ill-fated Donner Party when it departed from Independence, Missouri. *Id.* at 6

The public wharves were an important locale for reaching these audiences. The Tract Society sought " 'to distribute tracts and books among the thousands of flatboatmen and raftmen landing at these ports, and the crews of the steamboats,' " and its colporteurs were " 'instructed to furnish every immigrant landing at the wharves, whom they can reach, with an evangelical book or tract.' " *Id.* Preachers were a common sight at the boat-landings of New York. Harper's Wkly., Oct. 21, 1871, at 998.

Organizations like the American Tract Society were part of the winds of change that swept across the religious landscape in the nineteenth century. Many groups, including the Baptists, the Adventists, and the Methodists, also went directly to the grass roots through massive circulation of printed materials, often successfully challenging the more established denominations of the day. *See* Nathan O. Hatch, *The Democratization of American Christianity* 141-46 (1989). These results were achieved in large measure through the distribution of literature in all available places, so that it "found its way into every nook and corner of the land." William Warren Sweet, *The Story of Religion in America* 254 (1950).

New York's, and the Nation's, first "international arrivals buildings" were Ellis Island and its predecessors as immigration centers, Castle Garden and the Barge Office. Then as now, "New York is in touch with all the world," and "is the chief gateway through which the immigrant passes, coming from every clime under the sun." New York Bible Soc'y, *Seventy-Eighth Annual Report* 10 (1902). In the evangelists' view, "[e]very port of entry for immigrants in the United States is a natural distributing point. . . ." *The Bible at Two Southern Ports*, Am. Bible Soc'y Rec., Mar. 1914, at 36. Kennedy Airport, as the country's principal international point of entry, is in many ways the current equivalent of these marine depots of yore.



Religious book distributors were among the first people the new arrivals encountered at Castle Garden. *See* Harper's Wkly., May 29, 1880, at 342. At Castle Garden, agents of the New York Bible Society were "able to mingle with larger numbers of emigrants than they could meet in the boarding houses, in the streets, and on the wharves." New York Bible Soc'y, *Thirty-Second Annual Report* 12 (New York, New York Bible Society 1855). Its missionary work at Castle Garden was said to be "unsurpassed in opportunities for doing good," New York Bible Soc'y, *Fifty-Sixth Annual Report* 27 (New York, New York Bible Society 1879-80), and many immigrants were reported to have been "moved to tears" when presented with religious books, New York Bible Soc'y, *Sixty-Third Annual Report* 8 (New York, New York Bible Society 1886-87).

By 1908, forty-one missionary and similar organizations had established a presence on Ellis Island. Mary J. Shapiro, *Gateway to Liberty* 152 (1986). These included evangelical groups and other religiously-based organizations like the Young Women's Christian Association and its offshoot, the Travelers' Aid Society. Lise Hirschberg, The Chain of Protection: Social Work on Ellis Island in the 1920's, Paper Presented at the Fourth Annual Conference on Immigration to New York, New-York Historical Society 9 (May 16-17, 1986). Those landing at Ellis Island were greeted with bibles and other religious books, as well as political materials like a manual issued by the Daughters of the American Revolution. 1 *Statue of Liberty/Ellis Island National Monument Historical Resources Study* 904-05 (National Park Service 1984). The New York Bible Society, for example, had as a goal "to distribute God's Book among all sorts and classes in the city, in all accessible places, among all the immigrants of every race passing through Ellis Island, and upon vessels of every description in the harbor." New York Bible Soc'y, *Seventy-Eighth Annual Report*, *supra*, at 11.

The coming of rail did not diminish the phenomenon of transportation gateways as centers of communication. "Just as the crossing of two roads from earliest times, has been the start of many a village, so the crossing of two railroads has been a highly strategic factor in the development of cities." Froesch & Prokosch, *supra*, at 2.[9] The railroad station in particular was the central public space around which sizeable towns—Atlanta, Dallas, and Denver, for example—were built. H. McKinley Conway, *The Airport City and the Future Intermodal Transportation System* 2 (1977). Even rural "depot[s] became a type of social center." H. Roger Grant, *The Country Railroad Station in America* 8 (1978). Stations like Reading Terminal in Philadelphia, built in 1893, which incorporated a well known restaurant and, underneath it, a market, were designed to attract not only travelers but other visitors as well. *See* Edwin P. Alexander, *Down at the Depot: American Railroad Stations from 1831 to 1920*, at 272 (1970). The great metropolitan railroad station, like Grand Central Terminal or the old Pennsylvania Station, was a "micro-city, with shops, restaurants, lunch counters, bars, bookstores, communication centers, offices, first-aid stations, bootblacks, panhandlers, and pimps"—in short, "almost a microcosm of the unsleeping city." 2 Carl S. Condit, *The Port of New York* 161, 160 (1981).[10] Grand Central, moreover, functioned "as sort of a public hall for New York." William O. Middleton, *Grand Central* 119 (1977).

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[9] Indeed, "[m]any suburban communities have grown and flourished around [a single] railroad station." *Id.* at 18.

[10] Grand Central Station—called by a "Red Cap preacher" " 'a parish—a big one too; and a mighty good one,' " David Marshall, *Grand Central* 112 (1946)—became in the 1940's a site for missionary work and religious meetings. *See* Samuel M. Shoemaker, *The Most Unforgettable Character I've Met: Red Cap No. 42*, Reader's Dig., Feb. 1946, at 51.



From the beginning, railroad stations were places where "people met and mingled, where books and newspapers were delivered, where goods and foodstuffs arrived." Jeffrey Richards & John M. MacKenzie, *The Railway Station: A Social History* 2 (1986). The human complexities inherent in the idea of travel ensured that the station could not be simply a one-dimensional utility. It was, instead, "truly a gateway through which people passed in endless profusion on a variety of missions—a place of motion and emotion, arrival and departure, joy and sorrow, parting and reunion." *Id.* at 7. The natural consequence was that stations have always functioned as platforms for communication,[11] not the least of which was whistle-stop politicking, including major political speeches inside the stations. *See id.* at 125.[12]

As "an entrance to a city," Paul Goldberger, *Design Notebook*, N.Y. Times, Mar 23, 1978, at C10,[13] the airport has continued this tradition largely displacing railroad stations as vital "city nodes." *See* Lynch, *supra*, at

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[11] Beginning in 1891, Baptist organizations built and put into service "chapel cars"—"movable church buildings which could be hauled over railroads"—on trains throughout the country. Charles Herbert Rust, *The Evolution of the Chapel Car Movement* (American Baptist Publication Soc'y, n.d.) Earlier, in 1878, the American Bible Society had undertaken a larger scale program of bibles in trains, resulting, it was said, in conversions and in reducing the "demand for low literature." Eugene H. Pierre, *Apostolate of the Railway*, Bible Soc'y Rec., June 1873, at 90.

[12] Bus stations were also used for mass distribution of religious writings. Ralph W. Bayless, *Scripture Distribution at Bus Depots*, American Bible Soc'y Rec., Dec. 1951, at 154; *1988 Yearbook of Jehovah's Witnesses* 50.

[13] *See also Winged Victories*, Architectural Rec., June 1989, at 130 (Harrisburg International Airport described "as a dignified civic gateway to the Pennsylvania state capital"); Greg Irsfeld, *Airports Use Art To Enhance Terminals, Community Relations*, Airport Services, May 1989, at 20 (Nashville International Airport "a gateway to the community" [hereinafter *Airports Use Art*]).

74-75. Like the wharf and train station [14] before it, the airport "has done more than provide a carrier service. It has affected our economic way of life, it has made changes in our social viewpoints, and it has had a hand in shaping the course of political history." Robert Horonjeff & Francis X. McKelvey, *Planning and Design of Airports* 1-2 (3d ed. 1983).

Airports "are important to the growth of business and industry," Systems Planning Div., Federal Aviation Admin., *The Airport—Its Influence on the Community Economy* at 1 (1967), and have become cities "unto themselves." *Id.*[15] Unlike management of a suburban post office,

> airport management . . . must operate such typical city services as fire protection, emergency medical, police and security services, and in many cases, a water system, sewage treatment system and communications system. At the same time, the administration must deal with concessions, ground transport and maintenance of buildings and grounds—all for a 'city' having a daily population greater than most . . . cities.

*Id.*

The airport is also "very important in the present and future life of a town, because it connects the two with

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[14] The historical link between rail and air is reflected in airport architecture. Helmut Jahn's United Airlines Terminal at O'Hare International Airport, for example, is an "evocation of the soaring iron and glass pavilions of the great Victorian railway stations." *The Temple of Marketing*, New Republic, Oct. 26, 1987, at 25. Similarly, the passenger terminal building at Harrisburg International Airport highlights "the earthbound model of the classic railroad station." *Back to the Future*, Architectural Rec., June 1989, at 138.

[15] This trend began shortly after World War II. As the normal growth of cities swelled, "the city grew out toward the airport. Concurrently, the airport itself drew people and businesses. Even industries grew up around the airport." Edward G. Blankenship, *The Airport Architecture—Urban Integration—Ecological Problems* 10 (1974).



the world at large and links it to the general progress of the whole community." Henry V. Hubbard et al., *Airports: Their Location, Administration and Legal Basis* 3 (1930). The airport is "the door to the community through which pass all manner of people and ideas." Coffey, *Editorial Comment*, Airport Services, May 1977, at 10, 11.

The New York airports are archetypal. JFK is "[l]ike a seaport city of old." George Scullin, *International Airport* 13 (1968). It is "a World Center." *Id.* at 4. "Working in unison," JFK, LaGuardia and Newark, "become[] not only the gateway to the world but the crossroads of the world." *Id.* at 27.

### 2. *The general circulation areas of the terminals are public thoroughfares.*

The public concourses of JFK, LaGuardia and Newark, not to speak of airports nationwide, are vital thoroughfares, "an interface between modes of transportation." Edward G. Blankenship, *The Airport: Architecture—Urban Integration—Ecological Problems* 28 (1974). "With literally thousands of people entering and leaving the city along its concourses daily, it is only natural evolution for the airport to spawn [what] [w]e call . . . the 'Second City', a miniature replica of its downtown namesake in almost every respect." Edward Knevals. *The Airport: Second City* 3 (1967).

Passenger terminals are specifically designed to function as public thoroughfares. They contain appurtenances and services like those in urban commercial areas, including "lobbies . . . office space, concessions, newsstands, restaurants, and government . . . management facilities." Blankenship, *supra*, at 28. More than one billion people pass through airport terminals each year. *See* Ira Weinstein & Juliette Madrigal, *Airport Customers and Their Needs for the 1990s*, Airport Services, May/June 1991, at 18. For many, the journey down the concourse is "a

diverting promenade along a palm-bordered avenue where gateside lounges are interspersed with clusters of shops and restaurants, sidewalk cafés and parks, flower-banked terraces and shaded nooks." *A Sense of Place*, Architectural Rec., June 1989, at 135.

Retail establishments "are currently one of the most active areas of change in the airport facility." G.F. Doughty, *Review of Passenger Service Issues at Airports, in Airports for People* 9 (1988). Planners emphasize "elaborate retail facilities," *Winged Victories*, Architectural Rec., June 1989, at 130, as essential to the airport plan, *see, e.g.*, Paul H. Wright & Norman J. Ashford, *Transportation Engineering* 622, 634 (1989). This "striking trend[]," *Winged Victories, supra*, at 130, has transformed the terminal concourse into "main street U.S.A.," Greg Irsfeld, *Airport Concessions Reflect New Awareness of Market Demands*, Airport Services, May 1989, at 40 [hereinafter *Airport Concessions*]. The integration of airports and their communities is signaled by the fact that the prices of retail goods in airport stores must compete with off-airport prices. *See Airport Concessions, supra*, at 41; Laurie McGinley, *Airports Try To Ease The Pain of Waiting With New Ways for Fliers to Spend Money*, Wall St. J., Aug. 21, 1990, at B4.

The products offered in airports, moreover, "are no longer limited to typical newsstands and fast-food items. Gourmet dining, up-scale apparel shops, and specialty foods . . . are becoming commonplace." Doughty, *supra*, at 9. "Quality stores offering high fashion brand names have discovered the willingness of passengers to pay for their products," and "sales at airport shops have boomed in recent years." *Id.*[16] And, in many parts of the nation, "the airport is the ideal outlet for local industry

[16] For example, "[e]ncouraged by the success of their two stores at John F. Kennedy International Airport, officials at Bloomingdales' . . . plan to open four more stores in airports this year and seven next year." McGinley, *supra*, at B4.



to market its wares to high flying businessmen and affluent tourists." *Id.*[17]

National Airport has installed a $16 million food court and retail shopping area including popular retailers like Vie de France, Crabtree & Evelyn, McDonald's, Chez Chocolate, Benjamin Brooks, and two Smithsonian Museum shops. *Airport Concessions, supra*, at 42. In developing the Washington National marketing plan, airport administrators "wandered around commercial complexes . . ., places where passengers go when they are not at the airport," in order to "make the airport resemble a shopping mall." *Id.*

The three metropolitan New York airports are part of this phenomenon. By itself, the IAB is "equipped with all the conveniences one expects to find in a modern city." Roy Allen, *Great Airports of the World* 73 (1964). The IAB, however, is only one of many areas in the airports that closely correspond to busy city thoroughfares. The terminal buildings house pedestrian walkways, retail stores, banks, drug stores, nurseries, bars, restaurants, newstands, gift shops, medical offices, post offices, advertising displays, telegraph, insurance and car rental locations, and book stores. The IAB even contains an "impressive" art gallery established in 1969 that exhibits works of Miró, Picasso, Calder, and Dalí, among others. Suzanne Carmichael, *Stuck at the Airport? Then Look at the Art*, N.Y. Times, Dec. 15, 1991, § 5 (Travel), at 8. With hotels, chapels, and department stores on the premises, the airport complexes are mirrors of the immense urban agglomeration they serve.

Airport visitors "want all the services and amenities they can get." Lloyd Gite, *Your Ticket To High-Flying*

[17] Portland International Airport, for example, offers an "Oregon Market" designed "to reflect a local flavor." *Airport Concessions, supra*, at 40. The "refurbished commercial court . . . showcases products of the Pacific Northwest . . ." *Winged Victories, supra*, at 130.

*Profits*, Black Enterprise, Mar. 1991, at 56. Airports are responding by providing more and more kinds of facilities in their terminals that are usually found outside them. In Washington National, a traveler may purchase "a sandwich, some cole slaw or potato salad, maybe a six-pack of beer or some wine," *Airport Concessions*, *supra*, at 42, at a baggage-level gourmet delicatessen instead of at the corner market. Similarly, "meeters and greeters," who compromise "[t]he majority of airport customers," Weinstein & Madrigal, *supra*, at 19, "spend a lot of time in the airport, an average of 65 minutes, and they don't come . . . just for hugs and kisses," *id.* To the contrary, "[t]hose seeing travelers off come to have a meal and chat with departing passengers. Those meeting arriving passengers come to the airport early and browse, shop and snack." *Id.*

"Community objectives" are a fundamental part of the airport plan. Airports design passenger terminals that "[r]ender a unique and appropriate expression of the community", Horonjeff & McKelvey, *supra*, at 332, in order to attract non-travelers. Thus, "the most impressive interior space in the . . . main terminal at Palm Beach International is . . . a 600-foot-long-barrel-vaulted 'concession mall' lined with national fast-food outlets, a 'white-tablecloth' restaurant, and upscale shops that reflect the Florida resort city's high-toned image." *Id.* The steel-and-glass atrium at Milwaukee "features, among other shops, an excellent bookstore that attracts customers who have no intention of flying." *Winged Victories*, *supra*, at 130. At Washington National, "Anton's Bar and Grill . . . is a popular nightspot" with locals because of its security, anonymity, food, cocktails, "and if you don't like another customer, 'all you have to say is, "Sorry, got to catch a plane."' " McGinley, *supra*, at B4.

Non-travelers also visit airports to see art. Airport officials explain that "displaying works of art in their terminals . . . serves as a good marketing tool



that helps generate public support for their facilities." *Airports Use Art*, *supra*, at 20. San Francisco International spends $1 million annually on its "heralded" art. "Art hangs on corridor walls and in waiting areas, dangles over escalators and moving sidewalks, and lodges in cases along the walls of the tunnels that link the three terminals." Carmichael, *supra*, at 8. The temporary exhibits, which are coordinated by a full-time curator, "have set the standard for other airports. At any time, up to 11 shows are displayed at various locations." *Id.* at 9.

At Orlando International, works are "located throughout the terminal." *Airports Use Art*, *supra*, at 22. In a "project tying the airport with the arts, the aviation authority and airport concessionaires jointly sponsor an annual arts festival," which airport officials describe as a "good way to bring people into the airport." *Id.* Its purpose "is geared to the airport as a community center," and during the show free parking is provided for festival goers. *Id.*[18]

Architectural landmarks also attract non-travelers to the airport. JFK, "a place of absorbing interest," Allen, *supra*, at 71, features "[]the fantastic T.W.A. Flight Centre designed by Eero Saarinen," *id.* at 74, as well as "buildings by star second-generation Modernists" like I.M. Pei, Skidmore, Owings & Merrill and Edward Durrell Stone. *The Temple of Marketing*, New Republic, Oct. 26, 1987, at 26. O'Hare International boasts Helmut Jahn's "Terminal of Tomorrow," *id.* at 25, which, "with

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[18] Orlando Airport also sponsors orchestral performances during the year, as well as small "environmental groups" who perform "throughout the terminal." *Id.* at 22. Similarly, Nashville International brings in art exhibits "to display at the airport that reflect all the region's arts, along with national and international exhibits to provide people access to major art works." *Id.* The Nashville program also includes roving and stationary musical groups (ranging from Bluegrass to Dixieland, but with a sprinkle of classical music and opera) and mimes, who each Friday from noon to 2 p.m. perform "in the public areas of the airport." *Id.*

its dramatic glass-roofed gate concourses and subterranean sound-and-light show, has transformed the nation's busiest airport into a kinetic monument to American mobility." *Winged Victories*, *supra*, at 130. These monuments are throwbacks to the period "following World War II, when . . . [c]ommunities viewed their airports as a source of civic pride, and even people who couldn't afford a trip to Miami came out to the airport just for the thrill of watching those who could." *Id.*

Airport officials also encourage many expressive activities. At JFK, celebrities, "arriving or departing from the field . . . draw their peculiar brand of fans or fanatics." Scullin, *supra*, at 14. "[B]ecause of the presence of the United Nations . . . controversial political figures" regularly draw crowds of protesters and supporters. *Id.*

"On the other hand, . . . all prominent politicians up for reelection enjoy the exposure to the crowds, the press, and the TV cameras" that gravitate to airports. *Id.* Politicians did so in record numbers during the 1988 presidential primary campaign, when candidates

> tried to augment their advertising dollars by staging media events near major airports. Prominent in the campaign were fly-ins, where the candidate would touch down at an airport and be greeted by a clutch of local party officials, campaign workers, and reporters. The candidate would make 'the speech' to the cheering enthusiasts, mingle briefly with the crowd, and with a hearty wave at the top of steps, disappear back into the campaign airplane to fly to the next event.

Laurence W. Moreland et al., *The 1988 Presidential Election in the South* 8 (1991). The 1988 campaign was a "Tarmac Campaign," with candidates "hopping from airport to airport to hold press conferences and get a few minutes of local news coverage." William Schneider, *Class Conflict, Countryfolk and a Choir of Candidates*, L.A. Times, Mar. 6 1988, § V (Opinion), at 1.[19]



With the advent of "Super Tuesday," candidates have thus "come to view the nation as an interchangeable sequence of airports, access roads and motel meeting rooms." Walter Shapiro, *Hello, I Must Be Going*, Time, Mar. 7, 1988, at 20. There is simply no "time . . . to walk down many main streets or discuss issues over dessert and coffee in many living rooms." Moreland, *supra*, at A14.[20] Instead, "satellite hookups, demographic studies, airport press conferences and shrewd purchases of TV advertising time will replace house-to-house canvassing, stops in roadside cafes and saturation advertising as the key tactical elements of the presidential campaign." Thomas B. Rosenthal, *Campaigning Now Subtle Exercise in Demographics*, L.A. Times, Feb. 21, 1988, at A1.

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[19] As are many "grand political" schemes, the strategy of "hangar-to-hangar combat was born of necessity." Andrew Rosenthal, *Candidates Can Land on TV Just by Landing*, N.Y. Times, Mar. 3, 1988, at D23. The presidential aspirant Gary Hart, fresh from an unanticipated victory in the 1984 New Hampshire primary, "saw a sudden opportunity to win the South, even without organization. So he flew from one airport press conference to another." *Id.*

[20] The campaign of Senator Dole is a case in point. In one "frenzied" three-day period preceding Super Tuesday, Sen. Dole "touched down at five separate airports in Minnesota, four in South Carolina, plus one each in North Dakota, South Dakota, Missouri, Oklahoma, North Carolina, and Florida." Shapiro, *supra*, at 20. His entire campaign in Oklahoma lasted 83 minutes, and was highlighted by nine television cameras that "chronicled his arrival in Oklahoma City, as he strolled across the airport tarmac, climbed a flight of stairs and held a press conference." *Id.* In South Carolina, where Dole spent almost an entire day, he left an airport only once. "Typical of this hello-I-must-be-going style of stumping was the press conference in the airport lobby in Florence, with the fuselage of his campaign plane clearly visible through a wall of windows." *Id.*

### D. The Public Forum Status of Airports Is Consistent With *United States v. Kokinda.*

The majority below did not expressly find the airport terminals to be nonpublic fora. It did, however, count five votes in *United States v. Kokinda*, 110 S. Ct. 3115 (1990) —which involved a restriction *only* on solicitation and in which there is no opinion for the Court—to uphold the Port Authority's ban on solicitation and to strike down the ban on literature distribution. That result was to create a distinction that the Port Authority—the legislator of the rule—never made and has never defended. For that among other reasons, it does not follow from *Kokinda* that a ban on solicitations, not to mention other expressive activities such as literature distribution, in the general circulation areas of a major metropolitan airport is justified.

Most obvious, of course, is the vast architectural gulf between the walkway in *Kokinda* and the public areas of JFK, LaGuardia and Newark airports. The site in *Kokinda* was a narrow walkway "leading only from the parking area to the front door" of a suburban post office. 110 S. Ct. at 3120. There is simply no comparison between that essentially one-dimensional strip and sprawling complexes like the New York airport terminals, which contain postal facilities as well as countless other amenities.

The cul-de-sac walkway in *Kokinda* was not "a thoroughfare" and did not exist to facilitate the daily commerce and life of the city. *Id.* The opposite is true of the public spaces of an airport complex that advertises itself as the "gateway to the world."

The airports' lobbies, corridors, and public spaces, as has been discussed, are thoroughfares, enabling travel to, from, and through the New York metropolitan area. The airports not only "facilitate . . . daily commerce and life," 110 S. Ct. at 3120, but commerce and life in American urban centers would be unimaginable without them. When the court below declared that "the Port Authority's terminals are remote from pedestrian thoroughfares," App. 12, 925 F.2d at 581, it ignored not only the fact that the airports are intimately interconnected with the metropolitan area's street system, JA 382, but that the terminals are themselves "pedestrian thoroughfares" of considerable significance.



The court of appeals also relied on the belief that "[p]ersons using the passageways in terminals are not there to meet a friend for lunch, window shop, take the air, or engage in any of the multitude of other purposes for which typical downtown streets are used." App. 12-13, 925 F.2d at 581. On the contrary, the tens of millions of people who gather in and travel through the airports each year, many with time on their hands, do precisely the same things as they would do in "typical downtown streets." The court recognized that "the various commercial establishments and art exhibits at the three airports create an appearance similar to a busy downtown street." App. 11, 925 F.2d at 581. But the New York airports are not, as might be gathered from that remark, Potemkin villages. The commercial establishments, art exhibits, and other urban appurtenances are very real and serve the same functions as they do in a "busy downtown street"—providing the material necessities and amenities of quotidian pursuits, as well as places for entertainment, edification and high-tech political campaigning.

Nor can much weight be placed on an analogy between post offices and airports as "proprietary" governmental enterprises. A suburban post office, like the state liquor stores found in New Hampshire or Pennsylvania, does resemble, in all but ownership, a free-standing, single-purpose, private enterprise to which the public is invited for business.

These airports are very different. The airports—operated by the Port Authority as "an essential governmental function," N.Y. Unconsol. Law § 6634 (McKinney 1979); N.J. Stat. Ann. § 32:1-35:4 (West 1990)—are not proprietary in the sense indicated by the plurality in *Kokinda* and in the case it cited, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974). The government here does not directly sell goods and services to the public as it did when it operated the post office in *Kokinda* and the bus in *Lehman*. Rather, as when it builds and maintains public streets, the government provides a broad-based environment within which private businesses may operate and at which the public is encouraged to wander at will and to spend time and money at the vast array of available facilities.

### E. In Traditional Public Fora, Literature Distribution and Solicitation May Not Be Banned.

The Port Authority has not claimed that its ban on distribution and solicitation is a time, place, and manner regulation. Nor could it do so, for its rule is "an absolute prohibition on a particular type of expression." *United States v. Grace*, 461 U.S. 171, 177 (1983). This rule is invalid in a forum unless it is, at the least, "narrowly drawn to accomplish a compelling governmental interest." *Id.* The rule cannot pass this stringent scrutiny.

The Port Authority has not asserted otherwise, for it has premised its justification for the rule entirely on the hypothesis that the New York airport terminals are not public fora at all. Indeed, the Court has often made clear that certain kinds of "generally directed means of communication"—including, at least, literature distribution and solicitation—"may not be completely banned" in traditional public fora. *See Frisby v. Schultz*, 487 U.S. 474, 486 (1988).

For example, in a fair—a "limited" public forum—though "[t]he flow of the crowd and the demands of



safety are more pressing" than in a street or a park—the state may not "unnecessarily limit" the "right of every citizen to 'reach the minds of willing listeners,'" and must provide the "'opportunity to win their attention.'" *Heffron v. International Soc'y of Krishna Consciousness*, 452 U.S. 640, 651, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)).

While the rule upheld in *Heffron* confined to a fixed location the solicitation of funds and the distribution and sale of literature, it permitted solicitation and distribution at a place "within the area of the fairgrounds where visitors are expected, and indeed encouraged, to pass." *Id.* n.16. Thus the plaintiffs were enabled "to conduct any desired activity *at some point within the forum.*" *Id.* at 655 (emphasis added).

In any event, as discussed below, the justifications the Port proffers for its ban are insufficient even for a non-public forum. *See infra* pp. 44-47. By any standard, therefore, the challenged rule is invalid.

## III. REASONABLE TIME, PLACE, AND MANNER RULES ARE AVAILABLE TO ASSURE THE ORDERLY ADMINISTRATION OF AIRPORT TERMINALS WHILE PRESERVING RIGHTS OF EXPRESSION.

Two decades' experience demonstrates that expressive activities coexist easily with the commercial and transportation functions of airports, as they do with those of streets. Recognizing airports' "valid concerns . . . to expedite the processing of travelers, to maintain a free and orderly flow of traffic, and to avoid disruption of normal airport activities," *International Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263, 268-69 (7th Cir. 1978), the courts have upheld regulations that are narrowly tailored to further these interests.

Regulations upheld for the Chicago airports include restricting expressive activities from specified areas in

which "airport officials are concerned about security measures (*e.g.* the hijack, search, and security areas), locations in which travelers become part of a captive audience (*e.g.*, persons in line), or locations in which space is limited (*e.g.*, doorways, escalators)," *id.* at 268, prohibiting the erection of tables and other structures, *id.* at 270, and permitting closure for periods of unusual congestion and emergency security measures, *id.* at 270-71. The Pittsburgh airports were held to have validly enacted, among other things, similar place retrictions and a ceiling on the total number of distributors and solicitors permitted at any one time. *International Soc'y for Krishna Consciousness v. Griffin*, 437 F. Supp. 666, 671 (W.D. Pa. 1977). The Fifth Circuit upheld the Atlanta airport's imposition of "solicitation booths" for the receipt of contributions. *International Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 826-30 (5th Cir. 1979). The Miami airport enforces "designated First Amendment Zones," even within which further restrictions apply. *See International Caucus of Labor Committees v. Metropolitan Dade County*, 724 F. Supp. 917, 919 (S.D. Fla. 1989).

The permit system for National and Dulles Airports, in place, unchallenged, for over a decade, assures that the "solicitors or distributors of literature not exceed a number which would aggravate existing congestion." 45 Fed. Reg. at 35,315. In addition, solicitation or distribution may not be conducted near places that pose problems of congestion or security. *See* 14 C.F.R. § 159.94(d) (1991). Thus the FAA seeks to "provide[] the maximum freedom of movement to leafletters and solicitors" while preserving "the rights of others using the airports." 45 Fed. Reg. at 35,315.

Examples of this kind of regulation could be multiplied almost indefinitely. *See, e.g.*, cases cited in Table A, para. 4. The point is that, while the tradition of allowing distribution and solicitation at airports has become in-



grained, airports have been able to respond effectively to local conditions with appropriate restrictions.

Indeed, the Port has effectuated a similar régime at these very airports since 1975. JA 462. According to the Port, these "time, place, and manner restrictions," JA 469, "g[a]ve those engaged in the non-commercial distribution of literature and solicitation of money access to the greatest number of persons patronizing the public areas controlled by the Port Authority at these airports," JA 469-70. In fact, the Port stated that "[t]he only areas from which the First Amendment activities are excluded under the interim agreement are those congested areas where First Amendment activities would unquestionably interfere with airport operations." JA 470.

Even the present resolution containing the ban on distribution and solicitation allow, with restrictions, the "performance of any ceremony, speech, song, carrying of any sign or placard, or other such activity"—activities potentially far more disruptive than those completely prohibited. *See* JA 523-24. This inconsistent treatment of different media of expression demonstrates again, at the very least, that the Port could have safely promulgated restrictions on distribution and solicitation short of a total ban.

## IV. THE PORT AUTHORITY'S BAN ON FIRST AMENDMENT ACTIVITIES IS IN ANY EVENT UNREASONABLE.

"Public property which is not by tradition or designation a forum for communication" is a nonpublic forum. *Taxpayers for Vincent*, 466 U.S. at 814-15. In a nonpublic forum regulations of speech must be "reasonable and not an effort to suppress speech merely because the public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. And, although "[t]he Government's decision to restrict access to a nonforum . . . need not be the most

reasonable or the only reasonable limitation," *Cornelius*, 473 U.S. at 808, the ban may not be upheld out of hand. Rather, "[t]he reasonableness of the Government's restriction . . . must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Id.* at 809.

In determining whether the government's restriction on solicitation in *Kokinda* was reasonable, the plurality considered several factors: (1) the history of the restriction, 110 S. Ct. at 3122; (2) the government's interest as measured against the special attributes of the forum, *id.*; *see Heffron*, 452 U.S. at 650-51; and (3) the impact of the communicative activities on the forum, 110 S. Ct. at 3123; *see Cornelius*, 473 U.S. at 808-09.

**A. History Of The Regulation.**

Unlike the postal service in *Kokinda*, which had a long history of unsuccessful attempts to regulate solicitation on its walkways, 110 S. Ct. at 3172, the Port Authority can make no such claim. As explained above, an agreement between ISKCON and the Port Authority has been in effect for over seventeen years, allowing the distribution of religious literature and solicitation of funds within what even the Port Authority referred to as "appropriate public areas" of the JFK, LaGuardia and Newark air terminals. JA 63, 113.

In 1985, Morris Sloane, then Deputy Director of Aviation, testified with respect to petitioners' activities "that the operation has gone fairly well." Sloane Deposition at 75. Although in a subsequent affidavit Mr. Sloane referred to 183 unverified complaints which Port Authority staff had received between 1975 and 1986 regarding petitioners' activities, JA 514-15, those complaints—181 of which had been registered *before* his evalution—were apparently not of sufficient magnitude to alter his belief that the arrangement was working "fairly well." Moreover, in the more than three years between June, 1985,



when Mr. Sloane testified, and November, 1988, when the regulation was passed, the Port Authority claimed a total of two additional complaints, both of which involved the amorphous offense of "verbal abuse." Sloane Affidavit, Exhibit C.

Thus, unlike *Kokinda*, in which the postal service unsuccessfully attempted to regulate solicitation for fifteen years, the history here demonstrates that petitioners' expressive activities have not significantly impaired the Port Authority's ability to manage its terminals.

**B. The Port Authority's Interest And The Characteristics Of The Terminals.**

In the formal preamble to its regulation, the Port Authority articulates a single abstract interest—"the facilitation of air travel." JA 517. When measured against the special attributes of airport terminals, this interest is not of sufficient magnitude to justify a complete ban on expressive activities.

As described extensively above, airport terminals contain a multitude of facilities not directly related to air travel except by definitional break force. While restaurants, stores, bars, art galleries, postal facilities, and the like are convenient to travelers, they are not dedicated to air travel in the same way as are buying tickets, handling baggage, and getting on and off planes. Petitioners seek to conduct their activities only in those areas that correspond to commercial areas found in any city or town. JA 114-15.

There is no foundation, therefore, to conclude that petitioners' activities are inconsistent with the Port Authority's stated interest. The Port Authority seems to believe that an airport's "purpose" is whatever it says is one. Given the range of activities it permits at the airports, no other conclusion is possible. The notion of

inconsistency with airport "purpose" is therefore without objective content.

Moreover, as recent studies reveal, many travelers "spend their wait and flying time reading. Nearly 40% of business travelers will buy a newspaper or other reading material from a newsstand while in the airport; that compares with about 30% of the leisure travelers." Weinstein & Madrigal, *supra*, at 19. Colporteurs like petitioners are by no means an anomaly in transportation centers. To the contrary, in the tradition of the tract missionaries before them, petitioners provide a valuable service to travelers and others by distributing religious texts not otherwise easily available.

The legislative mandate given the Port Authority to manage its terminals, therefore, is not inconsistent with or impaired by the presence of distributors or solicitors—subject to reasonable regulation—in those terminal areas akin to public thoroughfares.

**C. Impact of Expressive Activities On The Port Authority's Interests.**

While a "finding of strict incompatibility between the nature of the speech . . . and the functioning of the nonpublic forum is not mandated," *Cornelius*, 473 U.S. at 808, the Port Authority must demonstrate at least "some incompatibility with general expressive activity," *id.* at 809, in order to justify a complete ban on expressive activity. In *Kokinda*, for example, the Court agreed that soliciting was "inherently disruptive of the postal service's business." 110 S. Ct. at 3123. Although the Port Authority has not made a specific showing that the distribution of religious literature and the solicitation of voluntary contributions is "inherently" disruptive of air travel, it does suggest that a ban on expressive activity is nonetheless justified by the claimed existence at the airport of such problems as "pedestrian congestion," "captive audiences," "security concerns," "fraud," and "finance."



No such interest, first of all, is mentioned in the formal statement of reasons for the resolution, which, as noted, focused entirely on an abstract concern for inconsistency with "purpose." The five claims made in litigation thus take on the coloration of post hoc rationalizations rather than actual reasons. *Cf. Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971) (litigation affidavits are "traditionally . . . an inadequate basis for review" of a regulation). In any event, none is persuasive, either individually or in combination.

***1. Congestion.***

The Port Authority asserts that "[a]irport pedestrian congestion is [its] single greatest problem." JA 466. Yet, in the 17 years that this case has been pending, the Port has not reported a single instance of a traveler missing a flight, failing to make arrangements for ticketing, baggage, or ground transportation, or missing a meeting or appointment because of petitioners' activities. "Commonsense" dictates, and experience confirms, that "there are numerous locations in the Airport where [expressive activities] could be [conducted] without obstructing the flow of traffic." *Multimedia Publishing Co.*, 774 F. Supp. at 981.

***2. Captive Audience.***

While the bus passengers in *Lehman* were unable to avoid the unwanted advertising, 410 U.S. at 306-08 (Douglas, J., concurring), petitioners' activities do not engender a "captive audience" problem. Petitioners expressly eschew any intent to approach people in any of the airline-controlled areas, where they might have to wait in line or remain in a confined place. Rather, petitioners limit their activities to the general circulation areas of the terminals, where people can easily walk away or simply say "no." Appropriate place restrictions are therefore sufficient to rectify any perceived concerns.

**3. *Security.***

Although the Port Authority need not show an active terrorist attack or a serious accident, "it is not free to foreclose expressive activity in public areas on mere speculation about danger." *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990). During the Kuwait war, airport terminals nationwide were placed on heightened alert and made off-limits to all un-ticketed passengers until a perceived security threat had passed. *See* 14 C.F.R. §§ 107.1, *et seq.* (1991). An effective mechanism thus exists for dealing with any security threats found to exist. *See Rochford*, 585 F.2d at 270-71. No nexus, in any event, has been articulated between distributors and solicitors—who are subject to the same security checks as are the tens of millions of people who pass through the airport each year—on the one hand, and airport security on the other.

**4. *Fraud.***

The Port Authority seeks to make much of petitioners' alleged "fraudulent" activities. By the Port's own calculation, however, there has not been a single claim of fraud or misrepresentation reported since 1981, and in the period betwen 1975 and 1986, Port Authority staff received a total of only eight complaints, none of which is substantiated. Sloane Affidavit, Exhibit C. Fraud, in any event, can be prevented or rectified by enforcement of existing laws. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980).

**5. *Financing.***

The Port Authority contends that its restriction is reasonable because petitioners' activities are incompatible with the Port's sources of revenue. The Port Authority, of course, is a billion-dollar enterprise, whose primary sources of revenue are bonds and landing fees.



In 1990, the Port Authority had gross operating revenues of $1,690,730,000, a 10.7% increase over 1989. Port Auth. of N.Y. & N.J., *Comprehensive Annual Financial Report for the Year Ended December 31, 1990*, at 37 (n.d.). Although the Port Authority receives revenue for airport concessions, it is virtually inconceivable that petitioners' activities have had any discernible affect on the Port Authority's fiscal integrity.

In sum, the Port Authority's legitimate interests are not inconsistent with petitioners' activities. Although airports were created to facilitate air travel, a notably ill-defined notion, they serve many other functions "for the benefit of the people." Thus, not only is the distribution of literature and solicitation of donations not "inherently disruptive" of airport operations, but it is inherently consistent with the function, design and purpose of such facilities.

## CONCLUSION

The judgment of the United States Court of Appeals should be reversed insofar as it upheld the Port Authority's ban on the sale of literature and the solicitation of contributions. The judgment should be affirmed insofar as it held invalid the Port Authority's ban on the distribution of literature.

Respectfully submitted,

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## TABLE A

### FIRST AMENDMENT LITIGATION INVOLVING AIRPORTS (PARTIAL LIST)

1. *Final judgments.*

*International Soc'y for Krishna Consciousness v. City of St. Louis*, No. 70509-F (St. Louis, Mo., Cir. Ct. Apr. 2, 1979) No. 70509-F (St. Louis, Mo., Cir. Ct. Apr. 2, 1979) (Lambert International Airport, St. Louis); *International Soc'y for Krishna Consciousness v. Lentini*, 461 F. Supp. 49 (E.D. La. 1978) (New Orleans International Airport); *International Soc'y for Krishna Consciousness v. Wolke*, 453 F. Supp. 869 (E.D. Wis. 1978) (General Mitchell Field, Milwaukee); *International Soc'y for Krishna Consciousness v. Adlum*, No. C-75-4015 (W.D. Wash. Feb. 7, 1978) (Seattle-Tacoma International Airport); *International Soc'y for Krishna Consciousness v. Collins*, 452 F. Supp. 1007 (S.D. Tex. 1977) (Houston Intercontinental Airport); *International Soc'y for Krishna Consciousness v. Englehardt*, 425 F. Supp. 176 (W.D. Mo. 1977) (Kansas City International Airport); *Mahoney v. Cook*, Civ. No. C-4778 (D. Colo. Aug. 25, 1975) (Stapleton International Airport).

2. *Temporary Injunctions.*

*ACLU v. Ginty*, No. C-2-77-251 (S.D. Ohio Apr. 19, 1977) (Port Columbus International Airport); *International Soc'y for Krishna Consciousness v. Cunningham*, Civ. No. 76-563 (D. Or. July 9, 1976) (Portland International Airport); *International Soc'y for Krishna Consciousness v. Lamb*, No. Civ-Lv-75-88-Rdf (D. Nev. Oct. 17, 1975) (McCarran International Airport, Las Vegas; *International Soc'y For Krishna Consciousness v. Wetzel*, No. Civ. 75-450 PHX WPC (D. Ariz. Sept. 2, 1975) (Skyharbor Municipal Airport, Phoenix); *International Soc'y for Krishna Consciousness*

*v. Garey*, No. C-75-705 (N.D. Ohio Aug. 29, 1975) (Cleveland Hopkins International Airport); *International Soc'y for Krishna Consciousness v. Sorenson*, No. 190090 (San Mateo County, Cal., Super. Ct. Mar. 13, 1975) (San Francisco International Airport).

3. *Agreed Judgments.*

*International Soc'y for Krishna Consciousness v. Stover*, Civ-76-486M (D.N.M. Oct. 3, 1976) (Albuquerque International Airport); *International Soc'y for Krishna Consciousness v. Fillis*, No. C-76-443 (D. Utah Mar. 22, 1976) (Salt Lake City Municipal Airport); *International Soc'y for Krishna Consciousness v. Hynes*, No. 75-9421 (Alaska Super. Ct. 3d Dist. Mar. 11, 1976) (Anchorage International Airport).

4. *Stipulated dismissal upon enactment of regulations by local authorities.*

*International Soc'y for Krishna Consciousness v. Waser*, No. C-77-107 (E.D. Wash. Sept. 7, 1979) (Spokane International Airport); *International for Krishna Consciousness v. Flesch*, No. 76-69 (E.D. Ky. July 12, 1978) (Greater Cincinnati Airport); *International Soc'y for Krishna Consciousness v. Andersen*, No. Civ. 76-0-388 (D. Neb. Apr. 19, 1977) (Eppley Airfield, Omaha), attorney's fees awarded, 569 F.2d 1027 (8th Cir. 1978); *International soc'y For Krishna Consciousness v. Mercado*, No. 76-8 (D.P.R. Sept. 28, 1976) (San Juan International Airport); *International Soc'y for Krishna Consciousness v. Bosquez*, Civ. No. SA-76-CA-189 (W.D. Tex. Aug. 20, 1976) (San Antonio International Airport); *International Soc'y for Krishna Consciousness v. Pixley*, No. Civ. 4-75-631 (D. Minn. July 2, 1976) (Wold-Chamberlain Field, Minneapolis-St. Paul); *International Soc'y for Krishna Consciousness v. Massachusetts Port Auth.*, No. 75-3468-T (D. Mass. Nov. 10, 1975) (Logan International Airport).



5. *Reversal of criminal convictions.*

*People v. Fogelson*, 21 Cal. 3d 158, 577 P.2d 677, 145 Cal. Rptr. 542 (1978); *Arsenalt v. State*, No. 75-18473 (Fla. Cir. Ct. Oct. 24, 1975) (Miami International Airport).

6. *Challenges to particular rules short of exclusions.*

*Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981); *International Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *International Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978).